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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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FILE: B-193779

DATE: May 18, 1979

MATTER OF: Customs Patrol Officers - [Entitlement to Overtime
and Night Premium Pay During Training]

DIGEST: Customs Patrol Officers who attended special training course claim overtime pay under the Fair Labor Standards Act (FLSA) or overtime or night premium pay under title 5, United States Code, for regularly scheduled training sessions conducted after 6 p.m. Where training qualifies under exception to prohibition against payment of premium pay for training in 5 U.S.C. § 4109(a), overtime under FLSA or overtime or night premium pay under title 5, United States Code, must be paid. Payment should be made to employees under title 5 or under FLSA, whichever law gives the greater benefit. 38 Comp. Gen. 363 (1958) clarified.

This decision is in response to a request from John A. Hurley, Assistant Commissioner (Administration), U.S. Customs Service, *AGC001576* Department of the Treasury, concerning the entitlement of certain Customs Patrol Officers to overtime or night premium pay while they attended the Navy's Sea, Air and Land (SEAL) School, *DLG 01610*

Our Office has received claims from three Customs Patrol Officers, Donald A. Bambenek II, David A. McDonald, and John H. Spillane, Jr., and the Customs Service is holding similar claims from other patrol officers while it awaits our decision. The question presented for decision is whether these employees are entitled to overtime or night premium pay under title 5, United States Code, or overtime under the Fair Labor Standards Act (FLSA) in light of the general prohibition on the payment of overtime and night premium pay during training contained in 5 U.S.C. § 4109.

The facts presented show that certain Customs Patrol Officers were directed to attend Navy SEAL School or "C-Fist" School so as to receive specialized training to assist them in the performance of their law enforcement duties. The employees contend, and the agency does not dispute, that the training was for more than 40 hours a week and that certain training sessions were conducted after 6 p.m. because the employees were being trained for situations which occur only at night. The employees claim overtime or night premium pay in connection with this training.

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Messrs. Bambenek and Spillane have claimed overtime, and Mr. McDonald has claimed night premium pay in connection with this training. With regard to Mr. McDonald's claim, the Customs Service recommends denial of his claim in a report to our Claims Division. The agency points out that 5 U.S.C. § 4109 prohibits the payment of overtime or night premium pay to employees who are selected and assigned for training. The agency recognizes that there are exceptions to this prohibition established under Civil Service Commission regulations, one exception being for training at night for situations which only occur at night. See 5 C.F.R. § 410.602(b)(2). However, the agency argues that the exceptions to the prohibition contained in 5 U.S.C. § 4109 only make the employee eligible for overtime or night premium pay and that it is still within the discretion of the agency to allow or disallow such pay during training. The agency also points out that Mr. McDonald continued to receive premium pay for administratively uncontrollable overtime while in training under the provisions of 5 C.F.R. §§ 410.602(b)(4) and 550.162(c)(2). Therefore, the agency argues that his only entitlement to night premium pay would be for regularly scheduled night duty under 5 U.S.C. § 5545(a) and that this night training was not "regularly scheduled work" within the meaning of the statute. See 5 U.S.C. § 5545(c)(2). The claims of Messrs. Bambenek and Spillane for regularly scheduled overtime under 5 U.S.C. § 5542(a) have been denied by the Customs Service for reasons similar to those cited above.

The agency has also received a claim from the National Treasury Employees Union on behalf of all Customs Patrol Officers who attended SEAL School for overtime compensation under the FLSA. Customs Patrol Officers are covered, i.e., "nonexempt" employees, under the FLSA. The Customs Service received apparently conflicting reports from the Dallas and Atlanta Regional Offices of the Civil Service Commission concerning overtime entitlement under the FLSA. We requested a report from the Office of Personnel Management (OPM) (formerly Civil Service Commission) concerning the entitlement of Customs Patrol Officers to overtime under the FLSA while attending SEAL School.

The report from the Director of the Compensation Division of OPM, dated February 16, 1979, states that "training" as defined by 5 U.S.C. § 4101(4) is compensable under the FLSA as hours of work but that the prohibition contained in 5 U.S.C. § 4109(a) applies equally to overtime pay under title 5 or under the FLSA. See Federal Personnel Manual Letter 551-3, August 29, 1974. After reviewing the prior determinations of the Dallas and Atlanta Regional Offices of the Civil Service Commission and the report submitted to our Claims

Division by the Customs Service (cited above), the Director's report concludes as follows:

"After discussions with staff members of the Customs Service, it is our understanding that the Customs Service agrees that the time spent in training at the SEAL and C-Fist Schools meets one or more of the exceptions. In fact, the entire training period may be excepted under 5 CFR 410.602(b)(3) which applies to employees 'given training on overtime, on a holiday, or on a Sunday because the cost of the training, premium pay included, are less than the costs of the same training confined to regular work hours' We believe that once an agency has determined that one of the exceptions applies, the agency does not have discretion to withhold overtime payment under the FLSA. To do so would be to deny payment for time which is hours of work under the FLSA and for which no specific prohibition applies under 5 U.S.C. 4109(a)."

The authority for the payment of expenses incident to training is contained in 5 U.S.C. § 4109 which provides, in pertinent part, as follows:

"(a) The head of an agency, under the regulations prescribed under section 4118(a)(8) of this title and from appropriations or other funds available to the agency, may--

"(1) pay all or a part of the pay (except overtime, holiday, or night differential pay) of an employee of the agency selected and assigned for training under this chapter, for the period of training * * *."

Our Office has long held that in view of the above-cited provision overtime or premium pay, holiday pay, or night differential may not be paid to employees for time spent in training unless an exception has been established by the Civil Service Commission (CSC). See 48 Comp. Gen. 620 (1969); 39 *id.* 453 (1959); 38 *id.* 404 (1958); *id.* 363 (1958); and B-168528, January 2, 1970. The exceptions to this prohibition, established by the CSC under the authority of 5 U.S.C. § 4102(b)(1) and Exec. Order No. 11348, April 22, 1967, are contained in 5 C.F.R. Part 410, Subpart F, and Federal Personnel Manual, Chapter 410, Subchapter 6.

It appears from the OPM report quoted above that the Customs Service now agrees that this training meets the exception to the prohibition on overtime contained in 5 C.F.R. § 410.602(b)(2) for training at night for situations which occur only at night. The OPM report also raises the question of the applicability of the exception contained in 5 C.F.R. § 410.602(b)(3) for training on overtime, on a holiday, or on a Sunday where the costs of training including premium pay are less than the costs of the same training confined to regular work hours. However, we have no information concerning relative training costs, and we do not believe that it is necessary to consider this question further.

Once it has been determined that the training satisfies one of the stated exceptions to the prohibition on the payment of overtime or premium pay, the question remains whether the Customs Service retained discretion as to whether or not to pay overtime or premium pay for these periods of training. With regard to the entitlement of these Customs Patrol Officers to overtime under the Fair Labor Standards Act, the Office of Personnel Management has advised us that, where the training qualifies under an exception to the prohibition in 5 U.S.C. § 4109(a), the agency may not withhold overtime payment for hours of work under the FLSA. We concur with that determination since under the FLSA, a nonexempt employee must be compensated at overtime rates for work which exceeds 40 hours in a week. See 29 U.S.C. § 207 (1976).

With regard to the entitlement of these Customs Patrol Officers to overtime and night premium pay under title 5, United States Code, we believe that where an agency has selected and assigned an employee to perform training and has determined that the employee shall receive his basic pay for the period of training, the agency has no discretion to deny title 5 overtime or premium pay where the training meets one of the exceptions to the prohibition in section 4109. 38 Comp. Gen. 363, supra, clarified.

In the present case, the Customs Patrol Officers were receiving premium pay for administratively uncontrollable overtime and, under the provisions of 5 C.F.R. §§ 410.602(b)(4) and 550.162(c)(2), they continued to receive this premium pay during training. As to their entitlement to any additional overtime or premium pay under title 5, United States Code, we point out that premium pay under 5 U.S.C. § 5545(c)(2) for administratively uncontrollable overtime is in lieu of all other forms of premium compensation, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty. Although the Customs Service originally denied the claims of the

B-193779

Customs Patrol Officers for overtime and night premium pay on the ground that the work was not "regularly scheduled", it appears that the agency has subsequently determined that the work was scheduled in advance, required to be performed, and assigned and approved by management. Since such work appears to have been scheduled to occur on successive days as evidenced by the training schedules, we agree that the work was "regularly scheduled" for the purposes of entitlement to overtime or night premium pay. See, for example, 48 Comp. Gen. 334 (1968).

Accordingly, payments should be made under title 5, United States Code, or under the FLSA, whichever provides the greater benefit.


Deputy Comptroller General
of the United States